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IN THE
Supreme Court of the United States
OCTOBER TERM, 1968

No. **11**

IGOR A. IVANOV, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

**On Petition for a Writ of Certiorari to the United States Court
of Appeals for the Third Circuit**

REPLY BRIEF FOR PETITIONER

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Supreme Court of the United States
OCTOBER TERM, 1967

No. 885

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v.

UNITED STATES OF AMERICA, *Respondent.*

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REPLY BRIEF FOR PETITIONER

As to Question One

The government relies upon the "clearly erroneous" standard enunciated in *Campbell v. United States*, 373 U.S. 487, 493 (1963), and *Palermo v. United States*, 360 U.S. 343, 353 (1959). This reliance is wholly misplaced, for the issue tendered in Question One concerns the standards to be applied in making findings on pro-

ducibility under the Jencks Act, and not the record support for findings of fact made upon a legal premise shared by the government and the defense. This distinction should not be unfamiliar to the government, as it was successfully urged upon the Second Circuit by the prosecution in *United States v. Aviles*, 337 F.2d 552, 556-57 (2d Cir. 1964), *cert. denied*, 380 U.S. 906 (1965). In *Aviles*, the court reiterated that "findings of fact that are induced by an erroneous view of the law are not binding." *Id.* at 557.

The government's argument does not, therefore, touch the central contention advanced in support of a grant of certiorari on Question One: namely, the need for an early and precise definition by this Court of the Jencks Act limiting phrase "related to the subject matter as to which the witness has testified."

As to Question Three

The government states at p. 13 of its brief: "The surveillance of the activities of Butenko and Pavlov later that evening [April 21, 1963] gave the agents reasonable grounds to believe that Butenko delivered a briefcase to Pavlov, who gave it to Olenov and Ivanov for a short time and then retrieved it and delivered it back to Butenko's car." This statement is without basis in the record. The sole evidence adduced by the government concerning Ivanov's actions on April 21 was as follows: Ivanov and Olenov were let out of the Soviet automobile at Lou's Hitching Post shortly after 6:30. Pavlov drove onto meet Butenko six miles away, apparently received a briefcase from him, then drove back to Lou's Hitching Post, arriving there *after* 7:15. But the FBI last saw Ivanov and Olenov in Lou's, *at* 7:15, and the record contains no evidence of Ivanov's

activities thereafter. Petition for Certiorari, pp. 5-6. Thus, there is no support for the assertion that agents could reasonably believe that Pavlov passed a briefcase to Ivanov and Olenov. Nor, it follows logically, is there any support for an inference that Pavlov retrieved the briefcase, or that he "delivered it back to Butenko's car." The contention that such an inference might reasonably be made is, moreover, wholly new to the government's position, as examination of its brief in the Court of Appeals reveals. See Brief and Appendix for Appellee, *United States v. Butenko & Ivanov*, No. 15,170, 3d Circuit, pp. 9, 55, 58.

Not only that, but the FBI agents who testified at the motion to suppress hearing never referred to any belief in the passage of a briefcase, let alone to any "reasonable grounds" for such a belief.

The government's factual position on the issue of probable cause is, therefore, an essay in groundless speculation.

As to the Government's Conclusion

The government urges, in the conclusion to its brief, that the "judgment of the court of appeals as to both petitioners should be affirmed." Petitioner agrees with the government that this Court should reach the merits of the present case, but relies upon the Court's own study of the record for the proper outcome.

Respectfully submitted,

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